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No. 97-1391

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

FORD MOTOR COMPANY, PETITIONER

v.

DEE-WITT SPERAU AND SAMUEL R. FOSTER, II,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

We argued in the petition that either summary reversal or plenary review is warranted in this case because the Alabama Supreme Court evaded its obligation to apply the principles enunciated by this Court in *BMW* and, in so doing, violated Ford's due process rights in three distinct ways. Respondents fail to join issue on the merits of our arguments, instead relying on misguided theories of waiver and on state case law that has no bearing on the federal constitutional issues we have raised. The transparent inefficacy of their arguments serves to underscore the appropriateness of review in this case.

A. The Alabama Supreme Court Deprived Ford Of Due Process By Justifying Liability On The Basis Of A Theory That Was Not Presented To The Jury.

As explained in the petition (at 18-20), the Alabama Supreme Court renounced the race-based theory of liability upon which the case was tried and the jury was instructed and instead upheld liability and $1.8 million of punitive damages on the basis of what a dissenting Justice aptly termed a "post hoc 'race-neutral' rationalization" (Pet. App. 29a n.11 (See, J., dissenting)) — namely, that the sales and profit forecast provided to respondents was misleadingly optimistic given the performance history of the prior owner and respondents' status as new dealers. This violated due process, we argued, because Ford had inadequate notice of the latter theory of liability, which was neither the focus of respondents' evidence nor even obliquely referred to in their theory-of-the-case instruction and hence could not conceivably have been the basis of the jury's verdict.[1]

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[1] Respondents state (Opp. 7) that we first raised this issue in our application for rehearing. Of course, that is the first time we could raise it, since it was not until the Alabama Supreme Court changed the theory of liability in its opinion on remand that the issue came into existence.

Respondents do not deny that the Alabama Supreme Court changed the theory of liability after the case had been tried and decided. Instead, citing only Alabama case law, they contend (Opp. 7-10) that Ford was entitled to no more notice than that they would be pursuing a fraud claim relating to capitalization of the dealership and the sales and profit forecast. As we explained in the petition, however, more is required as a matter of federal constitutional law. Several of the cases we cited involved a post hoc effort to change, not the subject matter of the case, but the ***theory*** of liability. For example, in *Chiarella v. United States*, 445 U.S. 222 (1980), a case involving a printer's acquisition of stock in a company that he had deduced was about to be the target of a takeover, there was no change to either the statutory basis for prosecution — Section 10(b) of the Securities Act of 1934 — or the characterization of the printer's conduct as securities fraud by means of trading while in possession of inside information; what did change was the government's theory of liability for that type of fraud. The jury was instructed based on the theory that the printer had violated a duty he owed to those from whom he purchased stock of the target company, and the government sought to sustain the conviction based on the theory that he had violated a duty he owed to the acquiring corporation. This Court held that due process prohibited that kind of after-the-fact change in theory. *Id.* at 235-237. The present case is indistinguishable.

Respondents suggest (Opp. 7) that the cases upon which we rely are inapposite because they involve criminal prosecutions. But one of the cases — *Spevack v. Klein*, 385 U.S. 511 (1967) — is a civil case. The *Spevack* Court indicated not the slightest reluctance to apply the prohibition against post hoc changes in theory. Moreover, respondents offer no reason why the logic underlying the notice requirement in criminal cases should not apply in the civil context, particularly when, as here, the quasi-criminal remedy of punitive damages is implicated. Certainly, the Due Process

Clause applies to civil cases; and certainly the requirement of notice and opportunity to defend is about as fundamental a due process protection as there is.

True, in *BMW* this Court stated, with apparent reference to the provisions of the Sixth Amendment, that "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases." 116 S. Ct. at 1598 n.22. It went on, however, to stress that "the basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*." *Ibid.* (emphasis in original; citation omitted). It thus freely applied principles developed in criminal cases to support its pronouncements in *BMW*. See, *e.g.*, *id.* at 1597 & n.19 (citing criminal case for proposition that States may not impose punitive damages for conduct that was not illegal where it occurred); *id.* at 1598 & n.22 (citing criminal cases for proposition that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose"); *id.* at 1599 & n.24 (citing criminal case for proposition that punitive damages should be proportionate to the degree of reprehensibility of the conduct). Accordingly, the Court should not permit the punitive damages to stand when they can be justified only on a theory never tried to the jury.

Even putting the punitive damages aspect of this case aside, there is neither a textual nor a logical basis for contending that the notice component of the Due Process Clause does not apply in civil damages actions. We think it inconceivable, for example, that this Court would hold that a defendant could be found liable on the ground that its product was defectively designed when the sole claim considered by the jury was inadequacy of warnings. If there be any doubt on this point, that makes the instant case all the more worthy of review.

Finally, respondents assert (Opp. 10) that, by paying the compensatory damages, Ford somehow waived this argument. They neglect to mention that the parties specifically agreed that payment of the compensatory portion of the judgment would not "constitute[] the waiver * * * of any right which either [party] may now have * * *." Agreement ¶ 9 (Sept. 25, 1995). In any event, because Ford paid the compensatory damages before the Alabama Supreme Court changed the theory of liability, the payment could not possibly constitute a waiver of an issue that had not yet arisen. Moreover, we are aware of no case (and respondents certainly have not cited one) holding that payment of a judgment waives the right to challenge it on appeal. In the absence of a stay (which the Alabama Supreme Court had denied), respondents could have executed on their judgment. Ford was entitled to avoid this unpleasantness by paying the compensatory portion of the judgment and then seeking to recover that payment in the event the judgment were ultimately overturned. Respondents' frivolous waiver argument highlights their inability to make any meaningful response on the merits.

B. The Alabama Courts Deprived Ford Of Due Process By Permitting Imposition Of Punitive Damages Without Fair Notice To Ford That Its Conduct Was Subject To Punishment.

We asserted in the petition (at 21-24) that Ford's due process right to notice was violated in a second way because the Alabama courts retroactively read out of the punitive damages statute the requirement that respondents establish that Ford intended to deprive them of property or legal rights or otherwise injure them. As we noted in the petition (at 22), the Alabama Supreme Court repeatedly found — as the evidence clearly established — that Ford did not intend to deprive respondents of property or otherwise injure them. Respondents ignore this critical finding, asserting (Opp. 14) that they "contended and proved that Ford intended to cause them harm" by inducing them to purchase the assets of the

Selma dealership. Of course, bald assertions cannot trump the Alabama Supreme Court's finding. In view of that finding, the only remaining issue is whether, at the time of the events in this case, Alabama law gave Ford fair notice that well-intentioned misrepresentations or omissions could give rise to punishment. As in *Bouie* — a case that respondents do not even mention, let alone attempt to distinguish — the applicable statute was "narrow and precise" (378 U.S. at 352), permitting punitive damages only in those fraud cases in which the defendant intended to deprive the plaintiff of property or legal rights or otherwise cause injury. Alabama law accordingly gave Ford "no reason even to suspect" that its benignly motivated conduct could be subject to punishment (*ibid*).

Respondents also assert (Opp. 13) that there is a legal right not to be defrauded and that *ipso facto* there is adequate evidence that Ford deprived them of "legal rights." Such a construction of the punitive damages statute — which was neither presented to the Alabama Supreme Court during the remand proceedings nor adopted by that court — would render the intent-to-injure requirement a nullity. If the legal right to which the statute refers could encompass the right not to be defrauded, there would have been no point to requiring proof that the defendant intended to deprive the plaintiff of property or legal rights because that requirement would be met in every fraud case. Ford certainly could have had no notice at the time of its conduct that the statute might be interpreted in such a peculiar way. Accordingly, even had this argument been accepted by the Alabama Supreme Court, it would not defeat Ford's notice argument.

Respondents argue (Opp. 14-15) that the evidence was sufficient to support a finding that Ford's conduct was oppressive and malicious. Although we dispute that contention, it is irrelevant here. The requirements of the statute are conjunctive, and our argument is based on the Alabama courts' retroactive elimination of the intent-to-injure

requirement, not on their interpretation of the other prerequisites to the imposition of punitive damages.

Finally, respondents claim (Opp. 15-16) that, by citing the Deceptive Trade Practices Act (DTPA) in support of our argument that the punitive damages are disproportionate to the legislatively established fine for comparable conduct, we somehow conceded that Ford had adequate notice that its conduct could be subjected to punishment. But we have never contended that the DTPA applies to Ford's conduct. To the contrary, in the remand proceedings we specifically asserted that "Ford's conduct in this case could not conceivably be regarded to violate any criminal or regulatory statute" but that the DTPA provided "the closest analogy" for purposes of the comparative fines guidepost. Ford Motor Company's Brief on Remand at 38, *Ford Motor Co. v. Sperau,* 1997 WL 545878 (Ala. Sept. 5, 1997) (No. 1931591). That is hardly an admission that the DTPA gave Ford notice that it could be subject to punitive damages in the absence of an intent to injure.

C. The $1.8 Million Punishment Is Grossly Excessive And Therefore Violates The Due Process Clause Of The Fourteenth Amendment.

Respondents make no effort to defend the Alabama Supreme Court's treatment of the *BMW* factors. Instead, they contend (Opp. 16) that, if this Court were to grant review here, it would be relegated "to the role of conducting de novo reviews of every state court punitive damages case." Of course, this Court does not obligate itself to review every petition on a particular subject merely because it grants review in one case on that subject. Moreover, as the petition demonstrates, this is no run-of-the-mill challenge to a state court's excessiveness review. This case involves a blatant deviation from the Court's admonition that punitive damages must be proportionate to the degree of reprehensibility of the misconduct — one so egregious that a dissenting Justice

concluded that it was only by means of "forensic gymnastics" that the majority could hold the conduct to justify a near $2 million punishment (Pet. App. 29a (See, J., dissenting). Review is warranted to send a strong signal that this kind of defiance of this Court's mandate is intolerable.

Respondents also suggest (Opp. 16, 17) that review is unwarranted because the Alabama Supreme Court materially reduced the original punishment. But the issue is not where the judgment started, but rather where it wound up. Here, it wound up at a figure that cannot possibly be squared with the (exceedingly minimal) degree of reprehensibility of the conduct. Review is warranted to enunciate clearly that a punishment of close to $2 million cannot be justified when the conduct barely registers on the reprehensibility scale.

CONCLUSION

The Court should either summarily reverse the judgment of the Alabama Supreme Court or grant plenary review.

Respectfully submitted.

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